STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2012AP002513CR

STATE OF WISCONSIN

Plaintiff-Respondent-Petitioner,

vs.

RAPHFEAL LYFOLD MYRICK

Defendant-Appellant,

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, REVERSING THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE REBECCA F. DALLET PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The case is presently set for oral argument; this Court ordinarily publishes its opinions.

STATEMENT OF THE CASE

Myrick recognizes that he is not required under Wis. Stat. Sec. 809.19 to provide a "statement of the case" or "statement of facts" as part of this brief. Nonetheless, Myrick elects to do so as the procedural history and facts of the case demonstrate that there was indeed a "plea agreement" between the parties and that Myrick made an "offer" to the prosecutor to plead guilty.

The State casts this appeal as a question of whether the court of appeals "acted in excess of its jurisdiction and usurped the exclusive authority of the supreme court to amend the statutory rules of evidence." See State's brief at p.3. The State asserts in its own "statement of the case" that the court of appeals "applied the relevant rule of evidence in a novel way that is not contemplated by its plain language or any construction of that language, in substance rewriting the statute significantly differently from the way it was written by its drafters." See State's brief at p.3. To the contrary, when we examine the procedural history of the case as well as the substantive law

as to statutory interpretation, contracts, and Wis. Stat. Sec. 904.10, we see that the court of appeals properly applied Section 904.10 to the facts of the case.

STATEMENT OF FACTS

The State charged Myrick in Milwaukee County Case No. 09CF003494 with first degree intentional homicide as a party to a crime and possession of a firearm by a felon.

The State's case against Myrick came to trial twice. The first trial began on June 29, 2010 and ended with the trial court declaring a mistrial on June 30, 2010. 1:4-5. On that same day, the trial court brought in a different jury panel and began a new voir dire. 1:5. After jury selection but before opening statements, the State and defense, on July 6, 2010, advised the trial court that a "*resolution* ha(d) been reached." 1:6. Emphasis added. The trial court discharged the jury and set the matter for a status hearing on September 9, 2010. 1:6.

The terms of the "resolution" announced by both the State and defense on July 6, 2010, were set forth in a July 2, 2010 letter agreement between Assistant District Attorney Mark D. Williams, Myrick and trial counsel. A-

Ap.103-104. In representations before the trial court, ADA Williams characterized the letter agreement as both a "plea agreement" and a "contract" between the State and Myrick. 69:49, 62:5; A-Ap.100-102. The "plea agreement" required Myrick to cooperate with the State in connection with the prosecution of the alleged co-defendant, Justin Winston. A-Ap.103-104. The plea agreement specifically required Myrick to debrief and provide testimony against Winston. A-Ap.103-104. In relevant part the plea agreement provided as follows:

> The State is making the following offer of resolution based on Mr. Myrick being willing to cooperate in the prosecution of numerous cases involving Justin Winston. The State seeks debriefing and testimony in any case involving criminal conduct of Justin Winston, including the homicides of Maurice Pulley and Marquise Harris. The defendant as part of this negotiation agrees to testify truthfully whenever called upon by the State in the homicides of Marquise Harris and Maurice Pulley and any other criminal conduct the defendant is aware of involving Justin Winston.
>
> In exchange, the State will amend the charge regarding the murder of Marquise Harris to one of Felony Murder with an underlying charge of Armed Robbery.
>
> In exchange for the defendant's truthful testimony on the murder of Marquis Harris and Maurice Pulley and any other incidents of criminal conduct that Mr. Myrick is aware of involving Justin Winston, the State would recommend a period of 12-13 years initial confinement in the Wisconsin State Prison. You would be free to argue for any sentence you deem appropriate.
>
> The State requires a completely truthful debriefing statement by Raphfeal Myrick and this proffer/debriefing is to be conducted by City of Milwaukee Police Detectives Kent Corbett and/or Tom Casper and/or their designee, in your presence. The detective(s) would be armed with a copy of this proffer letter and until and assuming this proffer letter is signed by you and your client no debriefing will be allowed. Furthermore, the detective(s) who will interview your client assuming he agrees with the terms of this proffer letter, do not have the power and will not make any additional offers, promises or threats to your client other than what is set forth within the confines of this proffer letter. Anything related to said officers by Raphfeal Myrick during said proffer/debriefing will

not be used against him in the prosecution of his case except for impeachment purposes at trial. They may also wish to record the interview.

The State is completely free to pursue any and all investigative leads derived in any way from the proffer/debriefing, which could result in the acquisition of evidence admissible against your client, Mr. Myrick, in subsequent proceedings. Furthermore, if Mr. Myrick should subsequently testify contrary to the substance of the proffer/debriefing or any portion thereof, nothing shall prevent the State, as represented by the Milwaukee County District Attorney's Office or federal government, from using the substance of the proffer/debriefing at sentencing, or for any purpose at trial for impeachment or in rebuttal to the testimony of your client, or for any prosecution for perjury or obstructing. A-AP.103-104.

The "debriefing" took place on July 2, 2010, the same date listed on the letter agreement. 11:1. The "debriefing" began with Myrick, trial counsel, two detectives and ADA Williams all present. 11:1. The "debriefing" began at 10:00 a.m and ended at 12:24 p.m. 11:1,44. It was recorded and a transcription appears in the record at 11:1-44. During the "debriefing," Myrick described and implicated himself in the shooting of Harris. 11:1-44. In the middle of the "debriefing," the District Attorney of Milwaukee County John Chisholm, entered the room and spoke personally to Myrick and trial counsel. 11:22. District Attorney Chisholm's specific remarks at the meeting are set forth in the record at 11:22-29. District Attorney Chisholm explained why the District Attorney's office wanted Myrick's help in connection with Winston. 11:23. District Attorney Chisholm emphasized that in addition to the Harris case, the DA's office wanted to

prosecute Winston for the murder of Maurice Pulley, a witness who was shot to death one day after he testified for the state in a drug case. 11:23. ADA Williams indicated that they would give Myrick "more consideration" if he had more information about the Pulley case. 11:28.

Subsequent to the "debriefing," on August 13, 2010, Myrick, as required by the agreement, testified against Winston at Winston's preliminary hearing. 69:31-32[1].

Trial counsel and ADA Williams appeared for the status hearing on September 9, 2010 and requested that the case be set for another status hearing after Winston's trial which was scheduled for February 7, 2011. 1:6. The case was then set over for a status hearing on February 24, 2011. 1:6.

On February 24, 2011, trial counsel and ADA Williams appeared for the status hearing and again requested that the matter be set over to May 23, 2011. 1:6.

[1] Myrick's testimony, as introduced at trial through question and answer format between ADA Williams and Detective Kent Corbett, is contained in the appendix.

On May 23, 2011, trial counsel and ADA Williams appeared for the status hearing and requested a date "for entry of plea after 7-10-11." 1:6. The clerk set a "plea hearing" for July 22, 2011 at 1:30 p.m.[2]

On July 22, 2011, trial counsel, Myrick, and ADA Williams appeared for the "plea hearing." 1:6. At such time, ADA Williams informed the trial court that the "defendant chose not to be a witness in a jury trial and was uncooperative and request(ed) that the matter be scheduled for jury trial." 1:6.

On November 14, 2011, the case proceeded to jury trial for the second time. 1:7.

At trial, the State sought to introduce as part of its case-in-chief the testimony that Myrick gave at Winston's preliminary hearing. 62:5-6. Myrick objected on the basis that such testimony was given as part of the "plea agreement" with the State and therefore inadmissible:

[2] This court may take judicial notice under Wis. Stat. Secs. 902.01(2), (3) and (4), and **Sisson v. Hansen Storage Company,** 2008 WI App 111,¶11, 313 Wis.2d 411, 756 N.W.2d 667, that Winston's trial had been continued to July 11, 2011. See State of Wisconsin v. Justin T. Winston, Milwaukee County Case No., 2010CF3469, "Court record events" numbers 100 and 101, Wisconsin Court System Circuit Court Access Program.

THE COURT: All right. Mr. Kovac, this is a statement under oath in a court of law. How does the State not get to use this? 62:6.

ATTORNEY KOVAC: Because it's all part of the proffer. He said he was going to cooperate and then he's making a statement. When it talks about the fruits of derivative use, that's not continuing statements by him. We don't have to—every time he sits down and talks, we don't have to reinitiate the proffer. If they—if he made a statement and then they are able to go out and find a gun because of it or they are able to find another witness, that's derivative use, but what the proffer insures him is that the statements that he's making— 62:6.

THE COURT: During the proffer. 62:6.

ATTORNEY WILLIAMS: During the proffer. 62:6.

ATTORNEY KOVAC: Well, and that's part— 62:6.

THE COURT: This is a prior statement made under oath. 62:6.

ATTORNEY KOVAC: Well, but that's a statement made after he proffered and it's consistent with his testimony—that's consistent with the agreement that he made under the proffer letter. If he had testified at the—pursuant to the negotiations at the trial- 62:6.

THE COURT: I think the State could use that too. 62:7.

ATTORNEY KOVAC: Not in its—not in its case in chief. Only for impeachment purposes. But to say that, all right, you are going to sit down and tell us everything you know about this case. Oh, and now we want you to testify at the preliminary hearing, but we can use that preliminary hearing—we can't use what you said in the room with the detective, but we can use the preliminary hearing. When he only testified at the preliminary hearing consistent with the agreement that he made under the terms of the proffer letter. 62:7.

THE COURT: The way I read this proffer letter, it says that anything related during the proffer will not be used against him in the prosecution except for impeachment. If he goes on to make a statement under oath in a court, that's—I mean when you are looking at heresay (sic) law, that is—has a presumption of reliability at least to overcome hearsay and I don't think the State gets stuck not using it. 62:7.

ATTORNEY KOVAC: Judge, because it's all—the only reason he did that was because of the agreement he made pursuant to the proffer letter and that—for the –for the State to be able to do this is inconsistent with the –with the spirit of the proffer letter.

Also, that proffer letter is drafted by the government. It's effectively a contract. And any ambiguity—and this is certainly an ambiguity. I mean for them to say you are telling us about this, but we are not going to use it against you. That's what they are saying in the proffer letter. We won't use it against you except for impeachment purposes. So this is what he tells them. And then he goes to the preliminary hearing pursuant again to the agreement that he has as evidenced in the proffer letter drafted by the government and then—then to say that the government can use what he said at the preliminary hearing. 62:8.

ATTORNEY WILLIAMS: The proffer had nothing to do with his testimony at the preliminary hearing. Other than guaranteeing him a certain recommendation by the State if he continued to testify. It has—his testimony at the preliminary hearing is not part of the proffer. It's independent of the proffer. 62:8.

THE COURT; I don't see how it can be deemed to be part of the proffer, Mr. Kovac. I really don't. 62:8.

ATTORNEY KOVAC: Well—62:8.

THE COURT: I mean if you even look at the next paragraph, it basically says this whole thing is null and void if he refuses to cooperate. But I still don't think under any circumstances the State can use a proffer in its case in chief. I mean even—even without such a letter as this. But when he takes the stand and he swears to tell the truth in a court of law, why can't the State use that. I still—I don't think there's anything in this letter that prevents the State and I don't think there's anything in the case law that prevents the State from using that. 62:9.

The trial court overruled Myrick's objections and ruled that the evidence was admissible in the State's case-in-chief. 62:11, 63:12, 64:83, 67:88-90. In making such decision, the trial court relied on **State v. Nash**, 123 Wis.2d 154, 366 N.W.2d 146 (Ct. App. 1985), review denied, 122 Wis.2d 784, 367 N.W.2d 224 (1985). 67:17,90. After a four day trial, the jury found Myrick guilty. 71:7. After a pre-sentence investigation, the trial court

sentenced Myrick to life imprisonment and ordered that he be eligible for release to extended supervision on July 26, 2043. 33:1. The trial court additionally sentenced Myrick to 5 years confinement and 5 years extended supervision, concurrent, on the felon in possession of a firearm charge. 34:1-2. Myrick timely filed a notice of intent to pursue postconviction relief, 35:3, and the State Public Defender appointed the undersigned counsel to represent Myrick on postconviction matters. 43:2. Myrick appealed to the court of appeals which reversed Myrick's conviction. A-Ap.105-117. The State filed a petition for review which this Court granted.

ARGUMENT

I. Doctrines of estoppel and waiver preclude State's argument that Myrick did not make an offer to the prosecutor to plead guilty.

The State's argument that Myrick did not make an offer to the prosecutor to plead guilty is precluded by the doctrines of waiver and estoppel. The State argues that "there were never any… negotiations culminating in any formal agreement between the state and Myrick that he would plead guilty to a reduced charge with a sentence recommendation by the state;" State's brief at p.4; that there was "no offer actually made by anyone;" State's brief at p.4; and that "(t)here is absolutely no shred of evidence anywhere in the

record that Myrick ever made any offer of any kind to the prosecutor or anyone else." State's brief at p.8. These arguments are wholly without merit and should be rejected. First, both parties and the trial court recognized that a "plea agreement" existed between the State and Myrick. In discussing the particular sections of the preliminary hearing transcript to be read to the jury, ADA Williams specifically explained that he planned to omit that portion of the transcript wherein Myrick was cross-examined regarding the agreement that he had with the State in exchange for his testimony. 69:49. In doing so, ADA expressly referred to the "plea agreement:"

MR. WILLIAMS: Where I am gonna end is 25, because then it goes into the *plea agreement* and what the *plea agreement* was, and that he had a *plea agreement* to testify. That is not relevant. A-Ap.100-102, 69:49. Italics added.

THE COURT: No, we're not getting into any *plea agreement*. A-Ap.100-102, 69:49. Italics added.

THE COURT: So, you really want the jury to hear that he had a *plea agreement*, negotiation to testify? A-Ap.100-102,69:49. Italics added.

MR. WILLIAMS: And we would recommend 12 to 13 years *and he was willing to plead guilty to the charge felony of murder?* A-Ap.100-102, *69:50.* Italics added.

Clearly, both the State's and the trial court's statements demonstrated a recognition that there was a "plea agreement" between the parties. ADA Williams specifically used the term "plea agreement" repeatedly. ADA Williams also expressly acknowledged in open court that under the "plea agreement," Myrick *"was willing to plead guilty* to the charge of felony murder." 69:50. Similarly, in discussing the letter agreement between Myrick and the State, ADA Williams specifically told the court that it contained the "terms of the contract" between Myrick and the State. 62:5. Supreme Court Rule 20:3.3, "Candor toward the tribunal" provides in relevant part:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact...to a tribunal...or fail to correct a false statement of material fact…previously made to the tribunal by the lawyer. SCR 20:3.3.

As this Court is no doubt aware, lawyers who knowingly make false statements to a tribunal run the risk of sanctions or discipline. See In Re **The Disciplinary Proceedings Against Lister**, 300 Wis.2d 326,356, 731

N.W.2d 254 (2007); See **In Re The Disciplinary Proceedings Against Sommers**, 339 Wis.2d 580,624, 811 N.W.2d 387 (2012). With Supreme Court Rule 20:3.3 as a backdrop, we must be certain that ADA Williams was truthful and correct in his statements to the trial court that there was a "plea agreement" between Myrick and the State, and that Myrick "*was willing to plead guilty* to the charge of felony murder." Such statements by ADA Williams constitute judicial admissions that create significant, if not fatal, problems for the State on appeal. Based on the State's express acknowledgment that the parties had a "plea agreement" and that as part of such "plea agreement," Myrick was "willing to plead guilty to the charge of felony murder," the State is judicially estopped from now arguing otherwise. See **State v. Ryan**, 2012 WI 16,¶32, 338 Wis.2d 695, 809 N.W.2d 37. Judicial estoppel is intended "to protect against a litigant playing 'fast and loose with the courts' by asserting inconsistent positions" in different legal proceedings. **Id.** The doctrine precludes a party from asserting a position in a legal proceeding and then subsequently asserting an inconsistent position. **Id.** For judicial estoppel to be available, three elements must be satisfied: 1)the later position must be clearly inconsistent with the earlier position; 2)the facts at issue should be the same in both

cases; and 3)the party to be estopped must have convinced the first court to adopt its position. **Id**. at ¶33. Such is the case here. First, the arguments advanced in the State's brief that "there were never any… negotiations culminating in any formal agreement between the state and Myrick that he would plead guilty to a reduced charge with a sentence recommendation by the state;" State's brief at p.4; that there was "no offer actually made by anyone;" State's brief at p.4; and that "(t)here is absolutely no shred of evidence anywhere in the record that Myrick ever made any offer of any kind to the prosecutor or anyone else…" State's brief at p.8, are patently contradicted by ADA Williams' repeated statements to the trial court about the "plea agreement" and Myrick's offer to plead guilty to the charge of felony murder. With respect to whether Myrick made an offer to plead guilty, the State's position on appeal is plainly inconsistent with the position that it took at the trial court level. Second, the facts at issue are the same in both proceedings; the facts did not change. Third, ADA Williams successfully persuaded the trial court that although there was a "plea agreement," Myrick's testimony was not part of the agreement. 62:5-11; P-Ap.116-122. The doctrine of judicial estoppel therefore precludes the State from playing "fast and loose" by asserting inconsistent positions in

different proceedings. In the alternative, Myrick maintains that the doctrine of record estoppel precludes the State's arguments. Estoppel by record is a doctrine similar to claim preclusion under which a party is prevented from litigating what was litigated or might have been litigated in another proceeding, but it is the record, not the judgment that is the bar to the second proceeding. See **State v. Miller**, 2004 WI App 117,¶30, 274 Wis.2d 471, 683 N.W.2d 485. For estoppel by record to apply, there must be an identity of parties and an identity of causes of action. See **Great Lakes Trucking Co., Inc. v. Black**, 165 Wis.2d 162,170, 477 N.W.2d 65 (Ct.App.1991). In this case, the parties are exactly the same as are the causes of action. The record below therefore prevents the State from making the arguments it now makes to this Court. Myrick maintains that this Court should reject the State's appeal on the basis of estoppel alone.

Similarly, Myrick maintains that the doctrine of waiver precludes the arguments made by the State. The State's position at the trial court level was not that a "plea agreement" or offer to plead guilty did not exist. Rather, the State's position was that the preliminary hearing testimony "had

nothing to do with" the "plea agreement." 62:8.[3] Of course, this position is contrary to the prosecutor's own express statement that Myrick "had a plea agreement to testify." 69:49. Nonetheless, if the State wanted to make an argument that there was no offer by Myrick, that there was no "plea agreement," that there was no plea negotiation, or that the July 2, 2010 letter in particular did not amount to an agreement or negotiation, it should have done so before the trial court. Instead, as noted above, the State took a vastly different position; it expressly admitted the existence of a "plea agreement" and recognized the July 2, 2010 letter as such. In doing so, the State waived or forfeited the arguments it now advances before this Court. It is a fundamental principle of appellate review that issues must be preserved at the circuit court. Issues that are not preserved at the circuit court, even alleged constitutional errors, generally will not be considered on appeal. See **State v. Huebner**, 2000 WI 59, ¶10, 235 Wis.2d 486, 611 N.W.2d 727. We have described this rule as the "waiver rule," in the sense that issues that are not preserved are deemed waived. **Id**. The waiver rule

[3] The State writes in its brief that the "Circuit court ruled that the testimony was admissible against Myrick under Wis. Stat. §904.10 because it was not given in connection with an offer by Myrick to the prosecuting attorney to plead guilty or no contest." State's brief at p.2. The trial court admitted the statements on two bases: 1)that they were made in-court and under-oath and 2) that they did not satisfy the "in connection with" standard as determined under **Nash**. The trial court inquiry focused on the "in connection with" standard as opposed to whether there was an "offer" in the first place. See 62:6,7,8,9; See P-Ap.117-120.

is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice. **Id**. The rule serves several important objectives. Raising issues at the trial court level allows the trial court to correct or avoid the alleged error in the first place, eliminating the need for appeal. **Id**. It also gives both parties and the trial judge notice of the issue and a fair opportunity to address it. **Id**. Furthermore, the waiver rule encourages attorneys to diligently prepare for and conduct trials. **Id**. Finally, the rule prevents attorneys from "sandbagging" errors or issues. See **Id**. The party who raises an issue on appeal bears the burden of showing that the issue was raised before the circuit court. **Id**. at ¶10. Of course, the doctrine of waiver befalls untimely arguments brought by the state as well as the defense. See **State v. Van Camp**, 213 Wis.2d 131,¶26, 569 N.W.2d 577: "Had the State raised this issue below, the defendant would have had the opportunity to cure, and the trial court would have had the opportunity to consider, this claimed defect. We are unpersuaded that justice would be served here by entertaining the State's arguments where the trial court was not afforded an opportunity to do so." Issues of whether an agreement existed between parties and whether an offer was made are necessarily fact intensive inquiries. As

such, the resolution of such issues is best carried out at the trial court level where the trial court can flesh out the facts in dispute. In this case, if the State genuinely believed that there was no "plea agreement" and that Myrick did not make an "offer" to plead guilty, then it should have raised such arguments below. The trial court then could have questioned trial counsel, Myrick, and ADA Williams as to the nature of the negotiations. The trial court could have developed the record as to who said what and when. Because the State did not raise this argument below, but instead pursued a different argument, the defense did not have the opportunity to develop the record as to its position. In this sense, the defense has been prejudiced by the State's failure to make before the trial court the arguments it now makes before this Court. The State should not be allowed to play "fast and loose" with its arguments and take advantage of its own omission. This Court should apply the waiver doctrine and reject the State's appeal.

II. Myrick made an "offer" to the prosecutor to plead guilty.

A. Procedural history of case requires conclusion that Myrick made an "offer" to the prosecutor to plead guilty.

As a preliminary note, Myrick believes that the express and specific words of ADA Williams, as discussed above, constitute clear evidence that a "plea agreement" existed between Myrick and the State and that Myrick made an "offer" to the prosecutor to plead guilty. In an effort to avoid redundancy, Counsel will not repeat in this section the facts and arguments made above. Suffice it to say, Myrick believes that the open-court statements of ADA Williams, that Myrick had a "plea agreement" and that Myrick "*was willing to plead guilty* to the charge of felony murder," 69:50, are dispositive of the issue of whether Myrick made an "offer" to the prosecutor to plead guilty. Nonetheless, the State's appeal compels Myrick to argue further.

When we consider the facts underlying the procedural history of the case, we see that such facts require the conclusion that the parties had a "plea agreement" to resolve the case. The same facts similarly require the conclusion that as part of that "plea agreement," Myrick made an "offer" to the prosecutor to plead guilty. Specifically, Myrick offered to plead guilty to a reduced charge of felony murder in exchange for the State's recommended sentence of 12-13 years initial confinement. According to the official "Criminal Court Record," identified in the record as the

"Judgment Roll," 1:1-15, after the second jury selection at Myrick's first trial and before opening statements, on July 6, 2010, the parties appeared in open court and advised the trial court that a "*resolution* ha(d) been reached." 1:6. Emphasis added. The trial court discharged the jury and set the matter for a status hearing on September 9, 2010. 1:6. The July 6, 2010 announcement in open court obviously came after execution of the July 2, 2010 letter agreement between Myrick and the State, and after the July 2, 2010 "debriefing." It makes no sense that the trial court would, right before opening statements, discharge the jury upon the parties' announcement that a "resolution" had been reached if in fact no agreement to resolve the case had been reached. The case simply would have proceeded to trial as scheduled. Both parties were ready for trial. Resources had already been consumed picking not one but two juries, and the jury was waiting to hear opening statements. As such, the parties' announcement of a "resolution" of the case is not one that can be considered lightly, especially when we have the July 2, 2010 letter that spells out the terms of such "resolution." Moreover, we have to consider that by that point, Myrick, along with trial counsel, had already met with District Attorney Chisholm, ADA Williams and two detectives to give the

"debriefing." By that time, Myrick had, in reliance upon his agreement with the State, relinquished his right to remain silent and given the incriminating statements. It makes no sense that Myrick, with counsel present, would relinquish his right to remain silent and make statements that could subject him to a sentence of life imprisonment, if Myrick did not have the security of a "plea agreement" in place. It makes no sense that Myrick would tender the incriminating statements required by the agreement but not tender the offer to plead to the reduced charge. After all, Myrick had been in custody for over a year and had made no incriminating statements up until that point. To accept the State's argument that Myrick never offered to plead guilty, we would have to accept that Myrick, with counsel present, was apparently willing to incriminate himself but not willing to plead to the reduced charge and gain the benefit of the recommendation of 12-13 years confinement. Such argument makes no sense. To accept the State's argument that Myrick never offered to plead guilty, we would have to accept that Myrick, about 40 days later, was willing to repeat his incriminating statements under oath at Winston's preliminary hearing, on August 13, 2010, but was not willing to plead to the reduced offense and gain the benefit of the sentencing recommendation.

69:31-32. Again, this makes no sense. Why would Myrick, in the middle of a first degree intentional homicide case and after exercising his right to remain silent for over one year, make incriminating statements in open court, unless he had the benefit and security of a "plea agreement?" Why would Myrick provide the required incriminating statements, not once but twice, but not offer to plead to the reduced offense? The State's theory is illogical and defies common sense.

Moreover, following Myrick's testimony at Winston's preliminary hearing, the case continued to proceed in a settlement rather than a trial posture. Indeed, trial counsel and ADA Williams appeared for the status hearing on September 9, 2010 and requested that the case be set for another status hearing after Winston's trial which was scheduled for February 7, 2011. 1:6. At the parties' request, the trial court set the matter for another status hearing on February 24, 2011. 1:6. Such conduct by the parties as well as the trial court is consistent with a "plea agreement" being in place and with the fact that Myrick would be entering a plea after the Winston trial.

On February 24, 2011, trial counsel and ADA Williams again appeared for the status hearing and once more requested that the matter be set over, this time to May 23, 2011. 1:6.

On May 23, 2011, trial counsel and ADA Williams appeared for the status hearing and requested a date "for entry of *plea* after 7-10-11." 1:6. Emphasis added. The clerk set a "*plea* hearing" for July 22, 2011 at 1:30 p.m. 1:6. Emphasis added. Myrick maintains that the parties would not have requested that the court set a specific date for Myrick's plea if in fact Myrick had not offered to plead guilty. Again, such conduct is consistent with a "plea agreement" being in place and with the fact that Myrick had offered to plead guilty to the reduced offense.

In evaluating the procedural history of the case, it is significant to note that between July 6, 2010 and July 22, 2011, a time period of over one year, the only court appearances held were those where the case was simply continued at status hearings so that Myrick could testify against Winston at trial. Throughout that entire one year, the case remained in a "settlement" posture. Myrick maintains that the procedural status as such illustrates that there was a "plea agreement" and that Myrick did in fact offer to plead

guilty pursuant to it. It was only in July 2011, after Myrick changed his mind about testifying against Winston at trial, that the "settlement posture" changed. On July 22, 2011 trial counsel, Myrick, and ADA Williams appeared for the "plea hearing." 1:6. At such time, ADA Williams informed the trial court that the "defendant chose not to be a witness in a jury trial and was uncooperative and requested that the matter be scheduled for jury trial." 1:6. It was at this point that the State began to back-peddle in its characterization of the "plea agreement" with Myrick.

B. Case law regarding contracts and Sec. 904.10 requires conclusion that Myrick made an "offer" to the prosecutor to plead guilty.

Applicable contract law

An offer is a communication by a party of what it will give or do in return for some act by another. **Carroll v. Stryker Corp**., 670 F.Supp.2d 891,898, (W.D. Wis. 2009), affirmed, 658 F.3d 675 (7th Cir. 2011), citing **In re Lube's Estate**, 225 Wis. 365, 368, 274 N.W.276 (1937). No particular form of communication is required- an offer may be made in writing, orally or implied in fact from the conduct of the parties and other circumstantial evidence. **Id.** citing **Goetz v. State Farm Mut. Auto. Ins.**

Co., 31 Wis.2d 267,272, 142 N.W.2d 804 (1966). Under the common law, "[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." **Rich Products Corp. v. Kemutec, Inc**., 66 F.Supp.2d 937 (E.D.Wis.1999), affirmed, 241 F.3d 915 (7th Cir. 2001), citing RESTATEMENT (SECOND) OF CONTRACTS §24 (1979). To the extent that the language of an agreement presents an ambiguity, the ambiguity should be construed against the drafter. See **Maryland Arms Ltd. Partnership v. Connell**, 2010 WI 64,¶23, 326 Wis.2d 300, 786 N.W.2d 15. Language is ambiguous if it is susceptible to more than one reasonable interpretation. **Solowicz v. Forward Geneva Nat., LLC**, 2010 WI 20,¶36, 323 Wis.2d 556, 780 N.W.2d 111.

Applicable law under Section 904.10

Statements by a defendant are within Rule 904.10's prohibition if 1)the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and 2)the accused's expectation was reasonable given the totality of the objective circumstances. See **State v. Nicholson**, 187 Wis.2d 2d 688,698, 523 N.W.2d 573 (Ct. App. 1994), review denied

531 N.W.2d 327. Under Sec. 904.10, an "offer" to plead guilty or no contest may be implicit and should be considered "in context." See **State v. Norwood**, 2005 WI App 218,¶20, 287 Wis.2d 679, 706 N.W.2d 683, review denied, 712 N.W.2d 34, 289 Wis.2d 10: "We construe the letter as a whole as an offer to plead and conclude that any incriminating statements in the letter were integrally intertwined with this offer. We cannot feasibly separate a defendant's expressed willingness to enter a plea agreement from his or her reasons for wanting to do so."

Analysis

When we consider the basic principles from contract law, that "[a]n offer is the manifestation of willingness to enter into a bargain," **Rich Products Corp. v. Kemutec, Inc**., supra, and that it "may be implied in fact from the conduct of the parties and other circumstantial evidence," **Carroll v. Stryker Corp**., supra, we see that there are various sources in the record that demonstrate an "offer" by Myrick to plead to guilty. This becomes even clearer when we consider the case law interpreting Section 904.10 which provides that an offer to plead guilty may be "implicit" and should be considered "in context." See **State v. Norwood,** supra**.** First, we have

the express or explicit statements by ADA Williams acknowledging the existence of a "plea agreement" and that Myrick was "willing to plead guilty to the charge of felony murder." A-Ap.100-102. Second, in conjunction with ADA Williams' express statements, we have multiple statements by trial counsel emphasizing the agreement or deal that existed between Myrick and the State. 62:6,7;69:50. Third, we have the procedural record of the case itself, which shows that the parties advised the trial court that they had reached a "resolution," 1:6, and requested that the matter be set for a "plea hearing." We similarly have the court setting the matter for a "plea hearing." 1:6. Fourth, we have the July 2, 2010 letter agreement itself. A-Ap.103-104. In the letter, which by its own terms is noted as an "offer of resolution," the State offered to amend the charge to felony murder and recommend at sentencing a period of 12-13 years initial confinement. A-Ap.103-104. As consideration, the State expected Myrick's debriefing and testimony. While the letter did not specifically state that Myrick would have to enter a plea of guilty or no contest, this was implicit with the agreement. After all, how would the "offer of resolution" be effected if Myrick did not enter a plea? How would Myrick end up at the sentencing hearing pursuant to the agreement if he did not enter a plea?

How would Myrick receive the benefit of the recommendation if he did not enter a plea? Further, the agreement directed trial counsel and Myrick to sign the agreement, if they "agree(d) to abide by its terms" and then "give the signed original to one of the above-named detectives prior to the commencement of the proffer/debriefing." A-Ap.104. Myrick agreed to the terms and proceeded to the debriefing The agreement as such plainly contemplated and involved Myrick's offer to enter a plea of guilty, specifically to the reduced charge of felony murder. Nevertheless, in its brief, the State attempts to downplay the nature of the letter agreement. The State argues that [the prosecutor did not promise to actually make these concessions if Myrick cooperated, but hedged his offer by saying that it would be "at the discretion of said district attorney's office…as to whether the above negotiation will be conveyed to you to settle [this] case short of trial."] See State's brief at p.4. The State bases this argument on an incomplete reference to agreement's language. What the State fails to provide along with this reference is the more complete language indicating that such discretion was to be exercised by the district attorney's office *after* Myrick's debriefing. Indeed, the relevant passage of the agreement states as follows:

After the substance of the proffer/debriefing of your client is provided by said law enforcement officers to the Milwaukee County District Attorney's Office as represented by myself and/or District Attorney John T. Chisolm, it will be at the discretion of said district attorney's office as represented by the parties named above as to whether the above negotiation will be conveyed to you to settle the above-captioned case short of trial. A-Ap.103-104.

Of course, the State obviously found Myrick's information helpful and desirable. The State therefore proceeded with the terms of the agreement and had Myrick testify, as required by the agreement, at Winston's preliminary hearing. If the State had a so called "hedge," as appellate counsel argues, such hedge was plainly limited in its timing and purpose. Perhaps more importantly, if the agreement gave the State a "hedge," the State forfeited its use. The State took Myrick's incriminating statements from the debriefing and required that they be made again, under oath at Winston's preliminary hearing. The State then maintained Myrick's case in a holding pattern for over one year as it proceeded in the prosecution against Winston expecting that Myrick would, as required by the agreement, repeat his incriminating statements at Winston's July 11, 2011 trial. Of course, as discussed earlier in this brief, the parties specifically requested that the court set Myrick's "plea hearing" for July 22, 2011 just days after Winston's July 11, 2011 trial. Clearly, if the State had any

"hedge," the State gave it up and chose to be committed by the agreement reached with Myrick.

Another passage in the State's brief about the letter agreement is similarly misconstructed. The State writes,

[Finally, the letter warned that "[s]hould we ultimately reach a negotiation in this case wherein Mr. Myrick agrees to cooperate with and/or testify truthfully on behalf of the State," and subsequently refuses to cooperate or testify, "the State reserves the right to declare any such negotiation null and void."] State's brief at p.4.

Again, the quotes taken from the letter are not complete. The State fashions this quote to ostensibly show that the State and Myrick had not yet reached a negotiation wherein Myrick agreed to cooperate with and/or testify truthfully on behalf of the State. However, when we read the passage in the letter from which this quote is fashioned, we see that it is taken out of context. The full passage reads as follows:

Should we ultimately reach a negotiation in this case wherein Mr. Myrick agrees to cooperate with and/or testify truthfully on behalf of the State of Wisconsin *in any other criminal case* that may be generated or charged based upon information provided by Mr. Myrick or which his testimony would be deemed to be relevant and material and, thereafter if Mr. Myrick refuses to cooperate with the State and testify truthfully and/or substantially and materially alters his previously provided information/testimony to the State of Wisconsin representatives, the State reserves the right to declare any such negotiation null and void. Emphasis added. A-Ap. 104.

The full passage demonstrates not that Myrick and the State had not yet reached a negotiation as to the Harris case, as implied by the passage

related in the State's brief, but that there was the possibility of further negotiations involving testimony against Winston in *other* cases. The court of appeals properly interpreted this passage to reflect an "on going plea-bargaining process" which it concluded distinguished the case from **Nash**. See A-Ap.116.

As for any argument that Myrick's failure to cooperate and testify against Winston at trial made the letter agreement "null and void," such argument has no relevance to the application of Sec. 904.10. Any breach of the agreement by Myrick simply meant that he would not get the benefit of the agreement; he would not receive the State's recommendation for 12-13 years confinement on a reduced charge of felony murder. A breach by Myrick did not mean that his statements made pursuant to the agreement would be admissible against him in the State's case. A breach by Myrick did not mean that he lost the protection afforded by Sec. 904.10.

To the extent that this Court finds the July 2, 1010 letter to be ambiguous in any respect, such ambiguity should be construed against the drafter of the letter, the State. See **Maryland Arms Ltd. Partnership v. Connell**, supra. Language is ambiguous if it is susceptible to more than one reasonable interpretation. **Solowicz v. Forward Geneva Nat., LLC**. supra. Myrick

maintains that the language in the letter established a "plea agreement" between himself and the State. Myrick similarly maintains that the terms of the agreement required him to plead guilty to the reduced charge of felony murder in order to obtain the sentence recommendation of 12-13 years confinement. Myrick maintains that by entering into the agreement, he agreed to abide by its terms. To the extent the State's chosen language, phraseology, or context created an ambiguity as to the agreement, such ambiguity must be construed against the State and in favor of Myrick. The Court as such must find that the letter agreement constituted an "offer" by Myrick to plead guilty to the charge of felony murder.

Finally, while Myrick contends that he did make an "offer" to the prosecutor to plead guilty, Myrick would emphasize that the appropriate inquiry under Sec. 904.10 is broader than whether a defendant has simply made an "offer." As the court of appeals correctly noted, under **Nicholson,** statements by an accused are within Sec. 904.10's prohibition if 1)the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and 2)the accused's expectation was reasonable given the totality of the objective circumstances. See **State v. Nicholson**, 187 Wis.2d 2d 688 at p.698. For the reasons previously discussed in this

brief, Myrick's circumstances clearly meet both prongs of the **Nicholson** test.

The court of appeals did not apply Sec. 904.10 in a "novel way" so as to "rewrite" the statute. See State's brief, p.3. The court of appeals correctly applied Sec. 904.10 according to previous case law interpreting the statute.

C. Case law regarding statutory interpretation requires conclusion that Myrick made an "offer" to the prosecutor to plead guilty.

Statutory interpretation begins with the text of the statute. **Klemm v. Am. Transmission Co**., 2011 WI 37,¶18, 333 Wis.2d 580, 798 N.W.2d 223. Statutory language is construed according to its common and approved usage; technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning. **Id**. An interpretation that fulfills the purpose of the statute is favored over one that undermines that purpose. **Id**. Statutory language must be construed reasonably. **State v. Ziegler**, 2012 WI 73,¶43, 342 Wis.2d 256, 816 N.W.2d 238. An unreasonable interpretation is one that yields absurd results or contravenes the statute's manifest purpose. **Id**. It is a "cardinal rule" of statutory interpretation to favor an interpretation that fulfills the

purpose of a statute over an interpretation that defeats the manifest objective of an act. **State v. Morford,** 2004 WI 5,¶21, 268 Wis.2d 300, 674 N.W.2d 349.

The purpose of Sec. 904.10 is to promote the disposition of criminal cases by compromise. See **State v. Nash**, 123 Wis.2d 154 at p.159. The exclusion was created to allow for free and open discussion between the prosecution and defense during attempts to reach a compromise. **Id**. Courts have interpreted the language of Sec. 904.10 as being clear and unambiguous. See **State v. Mason**, 132 Wis.2d 427,432-433, 393 N.W.2d 102 (Ct. App.1986).

Analysis

In rendering its decision, the court of appeals focused upon the case law under Sec. 904.10, as discussed above, and the express language of the statute itself. On page 6 of its decision, the court of appeals deconstructed Sec. 904.10 into its most basic parts:

-"Evidence of statements made in court"

-"in connection with"

-"an offer"

-"to the …prosecuting attorney"

-"to plead guilty"

-"is not admissible in any…criminal proceeding against the person." A-Ap.110.

The court of appeals then focused heavily on whether Myrick had made an "offer to…the prosecuting attorney" and concluded that Myrick indeed had made such an offer. A-Ap.110. The court of appeals' conclusion was a simple yet accurate interpretation of what constitutes an "offer" by a defendant under Sec. 904.10. The State advances a position that suggests the defendant's "offer" must be express or explicit, or use certain magical words to invoke protection under Sec. 904.10. But this interpretation is not supported by the plain language of the statute and the case law interpreting it. Sec. 904.10 only uses the term "offer" or "offers." It does not say express offers, explicit offers, or written offers. Therefore, what constitutes an "offer" by a defendant is plainly open to interpretation under the statute. And, as discussed earlier in this brief, courts have specifically found Sec. 904.10 to be applicable based on "implicit" offers. See **State v. Norwood**, supra. Moreover, courts will consider the offer "in context." **Id**. The State

refers this Court to the Judicial Committee's Note to Sec. 904.10, 59 Wis.2d R95 (1973) which it believes supports the arguments advanced in its brief.[4] Myrick maintains that to the contrary, the Committee's note supports Myrick's position. In particular, the note states that a "forfeiture of deposit by nonappearance" is "*construed to be an offer* addressed to the court and within the proscription of this section…" Judicial Committee's Note to Sec. 904.10, 59 Wis.2d R95 (1973). A default by nonappearance inherently contemplates a situation where the defendant has not filed an answer to the citation, demanded a trial, or otherwise responded in writing to the action. It similarly contemplates that the person has not appeared in court to personally challenge the action. As such, with no written response or record of a physical appearance, there is literally no evidence as to that person's intent with respect to the charge. There is specifically no evidence of an intent to plead guilty or no contest, or an offer to plead guilty or no contest. In fact, a person who is defaulted by nonappearance may have the

[4] In discussing the Committee's note, the State refers to the federal exclusionary rule, Fed.R.Evid. 410, and suggests that under such rule Myrick's statements made at the preliminary hearing would be admissible in evidence regardless of any plea discussions because the rule does not prohibit the admission of any statement made in court. See State's brief at p. 11. Myrick disagrees. Subsection (4) prohibits "a statement made during plea discussions with an attorney for the prosecuting authority…" To the extent that the plea discussions encompassed and required the in-court statements, which they did, Subsection (4) would exclude them. Additionally, subsection (b)(2) expressly contemplates that a statement by a defendant may have been made under oath or on the record as such section allows for the statement to be used in a criminal perjury proceeding.

exact opposite intent. A person could have the specific intent not to plead guilty or no contest and to instead contest the case, but because of mistake, inadvertence or the like, finds himself or herself defaulted. Nonetheless, the Committee's note indicates that the nonappearance is "construed to be an offer" to plead guilty or no contest "within the proscription of this section…". Myrick maintains that if the statute allows for an "offer" to plead guilty or no contest to be construed from a default situation, which it does, the statute requires this Court to find from the record in this case that Myrick indeed made an "offer" to plead guilty. Additionally, the Committee's note indicates "The exclusionary effect of this rule is *expanded* to apply to one liable for the conduct of the person who made the withdrawn plea or offer, e.g., insurance company, driver's license sponsor, employer." Judicial Committee's Note to Sec. 904.10, 59 Wis.2d at R96. Emphasis added. Therefore, even if the insurance company, driver's license sponsor or employer never makes the "offer" it still gets the benefit of the exclusionary rule. The "offer" is imputed to the respective liable party and such party is deemed to have made the "offer." Under the State's position, this could not be allowed because there would clearly be no evidence of any "offer" by the insurance company, driver's license sponsor

or employer. Under the State's position, the operation of the exclusionary rule in such respect would constitute an improper "legal fiction." See State's brief at pp.10 and 13. Nonetheless, the statute clearly allows for this type of expansive application. If Sec. 904.10 only applied to those situations where a defendant himself used certain magical words, such as "I hereby offer to plead guilty or no contest," Sec. 904.10 would be rendered meaningless. Most defendants communicate their intentions or positions to the prosecutor through their attorneys. There is therefore frequently no express or explicit overture by the defendant himself to the prosecutor. Similarly, even settlement discussions between defense counsel and the prosecutor are frequently not reduced to writing. It is simply the case that there can be an "offer" by a defendant to the prosecutor to plead guilty or no contest even though there is no express or explicit statement by the defendant himself. Section 904.10 should be interpreted in such a way as to promote its underlying purpose, to promote free and open discussion between the state and the defense. The State's narrow interpretation of Sec. 904.10 fails to do this and for this reason it should be rejected.

Further, the State's interpretation of Sec. 904.10 makes for "absurd results." First, under the State's theory, Sec. 904.10 would arguably only apply if there was an "offer" by the defendant himself. This would be rare given the role of defense counsel. Second, under the State's theory, Sec. 904.10 would arguably only apply if there was an express or explicit "offer" apparent from the record. This would be rare given that settlement negotiations are frequently not reduced to writing or placed on the record. Third, under the State's theory a defendant who responds to or "accepts" an offer made by the prosecutor would not be protected under Sec. 904.10 because it would be the prosecutor, not the defendant who made the "offer." In such situations, despite the defendant's clear "manifestation of willingness to enter into a bargain," **Rich Products Corp. v. Kemutec, Inc**., supra, the defendant would have no protection under Sec. 904.10. Fourth, the State's interpretation would encourage bad faith negotiations and shenanigans in characterizing what constitutes an "offer" for purposes of Sec. 904.10. For instance, in the State's brief, appellate counsel argues that "In essence, the prosecutor *offered* to *consider* making an *offer* of a reduced charge to which Myrick could plead if he cooperated in the case against Winston." See State's brief at p.4. Emphasis added. Under the

"offer…to consider…making…an offer" theory, the prosecutor could simply say, "Ok, if you agree to make an incriminating statement to this first degree intentional homicide charge, I'll *consider* making an offer of reducing the first degree intentional homicide charge to a disorderly conduct for a fine." Lured by such inducement and with the intent to plead guilty to the disorderly conduct charge, the defendant would make the incriminating statement only to have the prosecutor say, "You know, I've *considered* making that offer, and I've decided against it; and I will use your statement against you on the murder charge because Sec. 904.10 doesn't apply…I only made an *offer* to *consider* making an offer…and you as the defendant didn't make any offer, you just accepted my offer to consider making you an offer." While an extreme example perhaps, the State's interpretation of Sec. 904.10 nonetheless allows for this sort of semantic manipulation which is plainly contrary to spirit and purpose of the statute. Fifth, the State's interpretation of Sec. 904.10 would inevitably transform evidentiary issues under Sec. 904.10 into issues of ineffective assistance of counsel. A criminal defendant who decides to relinquish his right against self-incrimination as part of plea negotiations, typically, as here, has counsel to advise him. If defense counsel gets into a version of

the "offer…to consider…making…an offer" negotiation, or a situation where the prosecutor can claim that the defendant only "accepted" rather than "made" an offer, defense counsel will later be accused of being ineffective for 1)allowing his client to make an incriminating statement without the protection of Sec. 904.10 and/or 2)misinterpreting the application of Sec. 904.10 under the facts presented. Finally, given the risks to both the defendant and trial counsel in the above scenarios, the cautious defendant and prudent defense lawyer would be hesitant to make any statement as part of a plea negotiation. This of course would have a chilling effect on Sec. 904.10's underlying purpose, "to promote free and open discussion between the state and the defense." There can be little doubt that when Myrick and trial counsel met with District Attorney Chisholm, ADA Williams and the detectives on July 2, 2010, all parties understood that they were participating in the very type of discussions encouraged and protected by Sec. 904.10. Not surprisingly therefore, ADA Williams acknowledged before the trial court that Myrick's statements during that meeting could not be used against Myrick except for impeachment purposes.[5] 62:6. But on appeal, the State now advances a

[5] Under **State v. Mason**, the statements would be inadmissible under Sec. 904.10 for any purpose. See **State v. Mason**, 132 Wis.2d 427 at pp.432-433.

position that arguably would allow for even those statements to be admissible under Sec. 904.10. The type of meeting that occurred on July 2, 2010 would no longer happen if the Court adopts the State's arguments.

The United States Supreme Court emphasized the importance of guilty pleas and plea negotiations in **Blackledge v. Allison**, 431 U.S.63,71, 97 S.Ct. 1621, 52 Led.2d 736 (1977):

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings. **United States v. Robertson**, 582 F.2d 1356 at p.1365 citing **Blackledge v. Allison**.[6]

In contemplating the U.S. Supreme Court's statements, the Fifth Circuit in Robertson emphasized that even before the enactment of…Fed.R.Evid.410, the Court "recognize(ed) the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that his statements will later be used against him. **United States v. Robertson,** 582 F.2d 1356 at p.1365. "In essence, the rule of

[6] Curiously, the Court failed to expressly note that plea discussions and agreements similarly yield information which the government can use against other criminal actors and in other cases.

inadmissibility is designed to serve both as an incentive and as a prophylactic; the rule both encourages and protects a free dialogue between the accused and the government." **Id**. at p.1366. The policy reasons for the "rule of inadmissibility" are indeed well established at both the state and federal level. Nevertheless, the State urges this Court to render a decision which would undermine the policy interests at stake. The State's position in this regard is short-sighted. This Court should decline the State's invitation.

CONCLUSION

Under the theory that the court of appeals "usurped" this Court's rule making authority and effectively amended a statutory rule of evidence, the State asks this Court to reverse the court of appeals' decision. To the contrary, the law regarding statutory interpretation, contracts and Sec. 904.10 itself demonstrates that the court of appeals properly applied the statute. As such, this Court should affirm the decision.

Dated this _____day of February 2014.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served upon all opposing parties.

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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 9448 words.

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I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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